

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Jacqueline, Jaime, Michael,
and Shena VanLoozenoord,

Charging Party,

v.

Mountain Side Mobile Estates
Partnership, and Mr. and Mrs.
R. D. Dalke,

Respondents.

AND

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Michael Brace,

Charging Party,

v.

Mountain Side Mobile Estates
Partnership, and Mr. and Mrs.
R. D. Dalke,

Respondents.

HUDALJ 08-92-0010-1
HUDALJ 08-92-0011-1
Decided: June 18, 1993

Dorothy Crow-Willard, Esq.,
Jane S. O'Leary, Esq.,
Sara K. Pratt, Esq.,
Harry L. Carey, Esq.,
Carole W. Wilson, Esq.,
For the Charging Party

Stephen E. Kapnik, Esq.
For the Respondents

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION ON REMAND AND ORDER

Statement of the Case

On April 21, 1993, the Secretary of Housing and Urban Development remanded the Initial Decision and Order in the above-captioned case to permit consideration of the Charging Party's April 13, 1993, Motion for Partial Reconsideration and any opposition thereto. *See* 24 C.F.R. § 104.930(a) and (d). I issued an Order granting the Charging Party until May 6, 1993, to submit its brief in support of its Motion, and Respondents until May 21, 1993, to file a brief in opposition. Both parties timely filed briefs.

The Charging Party moves for reconsideration of that portion of the Initial Decision and Order that found no violation of 42 U.S.C. § 3604(a) and (b) and requests the assessment of damages against Respondents for those alleged violations. Respondents argue that the Initial Decision contains no clear error, and accordingly, the determination should not be modified. Upon further consideration of the matters raised by the Charging Party and Respondents' opposition, I find that Respondents did not violate the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"), and I again deny the Charging Party's request for relief.

Summary of Initial Decision and Order

Mountain Side Mobile Estates ("the Park") is a trailer park located at 17190 Mt. Vernon Road, Golden, Colorado, in unincorporated Jefferson County. It was developed in the 1960's. It has 229 lots for mobile homes, with an average of 10 lots per acre. The Park has limited recreational facilities and narrow streets compared to trailer parks built in the 1970's and later, and small "single-wide" mobile homes, typically with two bedrooms. The Park has a population of approximately 320 persons, with approximately 30 families with children under 18 years of age. Because the Park is located in a flood plane, significant modifications of the Park's infrastructure would require compliance with regulations of and approval by the Federal Emergency Management Agency, and could involve expenditures in the hundreds of thousands of dollars.

Prior to the effective date of the Fair Housing Amendments Act of 1988, the Park was an "adults only" Park. Respondents determined that it would not be feasible to qualify for the "55 and older" statutory exemption. *See* 42 U.S.C. § 3607 (b)(2). Accordingly, they decided to permit families with children. However, fearing an unlimited expansion of the Park's population, they considered instituting occupancy limits. Based on a Park population study and

a concern that overcrowding would place a burden on the water and sewer capacity and result in a decline in the quality of life, Respondents imposed a three persons per unit occupancy limit. Following the conciliation of a housing discrimination complaint,¹ Respondents retained QCI Development Services Group, Inc. ("QCI") to conduct an independent assessment of the Park's facilities and to assist in evaluating Respondents' occupancy standard. As a result of its assessment of the sewer system and the Park's physical limitations, in May 1991, QCI recommended a two persons per bedroom standard with a maximum limit of 916 Park residents. Respondents elected to maintain their existing limit of three persons per unit, thus restricting the total Park occupancy to 687 residents, well within the cap recommended by QCI.

Complainants are an unmarried couple, Jacqueline VanLoozenoord and Michael Brace, and Ms. VanLoozenoord's three minor children. After Complainants purchased a mobile home without informing the Park managers, Respondents brought eviction proceedings against them because the number of occupants in their dwelling exceeded three persons. The Jefferson County court granted judgment for Respondents, but HUD's conciliation efforts resulted in a stay of the eviction pending the outcome of this proceeding.

HUD presented statistical evidence concerning household composition through documents and the testimony of James Coil, a HUD economist. Mr. Coil testified that as of March 1991, at least 71.2% of all U.S. households with four or more persons contained one or more children under 18 years of age.

The Charging Party attempted to prove that Respondents' institution of the three-person occupancy limit was discriminatory against Complainants based on their familial status on both disparate treatment and disparate impact theories. I held that the Charging Party had failed to meet its burden under either theory. Initially I found that the record did not establish direct evidence of disparate treatment. Regarding indirect evidence of disparate treatment, I determined that the Charging Party had indeed made out a prima facie case. However, I determined that the QCI study established that the sewerage system and Park's physical limitations warranted some action to limit the population of the Park, and that the Charging Party had failed to demonstrate that Respondents' choice of a limit of three persons per unit was pretextual. I did not need to decide whether the Act contemplates a disparate impact analysis, because the Charging Party's statistics failed to support a prima facie case of disparate impact. I also concluded that even were a prima facie case of disparate impact established, the Charging Party had failed to demonstrate the existence of practical or affordable alternatives.

Discussion

The Statutory Exemption for Occupancy Restrictions

¹ At the time Respondents instituted the restriction, they initiated a \$15 surcharge on the third person. Respondents had removed this surcharge prior to their alleged discriminatory acts against Complainants. The removal was the result of HUD conciliation efforts on behalf of a Park resident. The HUD conciliation efforts did not extend to requiring Respondents to eliminate or modify the three-person occupancy restriction.

The Charging Party insists for the first time that the second prong of the three-prong shifting burdens analysis of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)² is inapplicable to this case because Respondents are supposedly claiming an exemption under the Act which they failed to prove. This purported affirmative defense is based upon the exemption for occupancy restrictions set forth in 42 U.S.C. § 3607 (b)(1), which provides that "[n]othing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title regarding familial status apply with respect to housing for older persons."

The Charging Party asserts that, rather than requiring Respondents merely to articulate a legitimate non-discriminatory reason following the establishment of a prima facie case, a different rule applies when Respondents' defense is the assertion of the statutory exemption for occupancy restrictions. According to the Charging Party, in this circumstance the exemption supersedes the *McDonnell Douglas* analysis and shifts the burden of persuasion to the Respondents to prove the reasonableness of the exemption. There are numerous problems with this assertion.

First, this contention is neither raised by the previous pleadings³ nor argued in the Charging Party's Post-hearing briefs; second, it is contradicted by the arguments advanced in the

²Under that analysis, the complainant first has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, respondent has the burden of production to "articulate some legitimate, nondiscriminatory reason" for its action. Third, complainant may still prevail if he or she is able to prove that respondent's asserted legitimate reasons are pretextual. *Pollitt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1987) (citing *McDonnell Douglas*, 411 U.S. 792, 802, 804 (1973)); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

³In its Charge of Discrimination, the Charging Party recognized the possible applicability of the exemption for "older persons" also set forth in 42 U.S.C. § 3607 (b)(1). The Charge states, "Respondents have failed to meet their burden of demonstrating that Mountain Side Mobile Estates meets the requirements of the Housing for Older Persons exemption from the familial status provisions of the Act." Determination of Reasonable Cause and Charge of Discrimination (July 24, 1992) ("Charge") ¶ 34. Nowhere in the Charge or the Amended Charge is the other exemption mentioned, nor was the case tried on the theory that it applied. See Charge; Amendment of Charge (Nov. 3, 1992).

Charging Party's Post-hearing briefs;⁴ third, Respondents did not rely on this theory in either their pleadings, the evidence they adduced at the hearing, or in their Post-hearing briefs; fourth, the statute expressly applies only to local, State and Federal occupancy restrictions;⁵ and fifth, the Charging Party misapprehends the nature of a statutory exemption. Because it is an affirmative defense, the claim that an exemption applies is analytically contingent upon and posterior to the Charging Party's successful demonstration of discrimination. In addition, substituting an affirmative defense for the second prong of the *McDonnell Douglas* analysis would improperly shift the Charging Party's burden of persuasion to the Respondents. Accordingly, I reject the assertion that Respondents failed to meet their supposed burden under 42 U.S.C. § 3607 (b)(1).

Disparate Impact Analysis

⁴The *McDonnell Douglas* analysis was unambiguously embraced by the Charging Party. See, e.g., Charging Party's Post-hearing Brief, pp. 42-44; see also Charging Party's Reply Brief, p. 10.

⁵The Charging Party relies on the Act, the regulations, the Department's comments to the regulations, and *United States v. Lepore*, Fair Housing-Fair Lending (P-H) ¶ 15,807, 17,260 (M.D. Pa. 1991) as support for its statement that "[o]ccupancy restrictions clearly are exemptions from the Act, whether established by governments or private owners or managers. . . ." Charging Party's Memorandum in Support of Motion for Partial Reconsideration (May 6, 1993) at 8 ("Charging Party's Memorandum"). The plain language of the Act and regulations, however, distinctly limits the exemption to governmental restrictions. See 42 U.S.C. § 3607(b)(1) and 24 C.F.R. § 110.10(a)(3). See generally 2A Norman J. Singer, *Sutherland Stat. Const.* § 46.01 (4th ed.).

The *Lepore* court, relying on HUD's comments to its regulations, did state that "HUD has provided that [42 U.S.C. § 3607(b)] applied to nongovernmental authorities." Fair Housing-Fair Lending ¶ 15,807 at 17,260. I disagree with this conclusion. The comments do not posit that the statutory exemption applies to private occupancy restrictions. Rather, they merely state that the Act does not preclude certain private restrictions. The comments are as follows:

While the statutory provision providing exemptions to the Fair Housing Act states that nothing in the law limits the applicability of any reasonable *Federal* restrictions regarding the maximum number of occupants, there is no support in the statute or its legislative history which indicates any intent on the part of Congress to provide for the development of a *national* occupancy code. . . . On the other hand, there is no basis to conclude that Congress intended that an owner or manager of dwellings would be unable in any way to restrict the number of occupants who could reside in a dwelling. Thus, the Department believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit. In this regard, it must be noted that, in connection with a complaint alleging discrimination on the basis of familial status, the Department will carefully examine any such nongovernmental restriction to determine whether it operates unreasonably to limit or exclude families with children.

24 C.F.R. Ch. 1, Subch. A, App. I at 879 (emphases added).

The Charging Party disputes my determination that, based on the facts of this case, nationwide statistics are inadequate to demonstrate a prima facie case of disparate impact on families with children under 18 years of age. In addition, the Charging Party reasserts that the testimony of Mr. Coil was sufficient to establish that these nationwide statistics are typical of the area in which the Park is located.

The Charging Party cites *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977), for the proposition that nationwide statistics may be relied upon if there is "no reason to suppose" that regional statistics do not "differ markedly" from national figures. *Dothard* concerned the disparate impact of height and weight requirements on women seeking employment as prison guards in the Alabama penitentiary system. The Supreme Court opined that "reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population." *Id.* This case presents a markedly different comparison. Unlike statistics comparing physical characteristics, the composition of households in the United States may vary depending on any number of demographic or socioeconomic factors. Nationwide statistics are an amalgam of all of these factors. Rather than there being "no reason to suppose" that the area around Golden, Colorado, does not statistically differ in the proportion of families with children under 18 from the rest of the United States, I see no reason to suppose that it would be the same. For example, it may well be that, due to depressed economic circumstances, in some areas a higher percentage of adult children live with their parents than are reflected in the nationwide statistics. On the other hand, in communities with large populations of university students or young working adults, there may be a higher incidence of congregate housing arrangements. Mr. Coil assumes that because the nationwide and local percentage of family households with four or more persons is similar, the same relationship exists between the nationwide and local percentage of households with minor children. Based on this record, such an assumption is unsupported and speculative.

The Charging Party, citing *United States v. Badgett*, 976 F.2d 1176 (8th Cir. 1992) and *United States v. Lepore*, Fair Housing-Fair Lending (P-H) ¶ 15,807, 17,260 (M.D. Pa. 1991),⁶ also contends that a prima facie case of disparate impact is established solely by the fact that Complainants, because they are a family of five, were adversely affected by the three persons per unit occupancy restriction. The logical extension of that argument is that proof of any occupancy restriction would establish a prima facie case merely because it excludes every group larger than the numerical limitation on group size imposed by the restriction. Indeed, HUD contends that *any* occupancy limit is presumed to be "unfair" as it impacts disparately on families with minor children. Charging Party's Memorandum, pp. 16-17. This contention flies in the face of the occupancy limits that are permitted by the Act and the regulations. There is no suggestion in the Charging Party's pleadings that the Act or the Regulations are unlawful.

⁶The Charging Party also relies on the Initial Decision in *Secretary v. Riverbend Club Apartments*, HUDALJ 04-89-0676-1 (Oct. 15, 1991). This decision was superseded by an Initial Decision and Consent Order dated November 14, 1991. Because the Initial Decision was superseded, the Charging Party's reliance on its text is misplaced.

Accordingly, I reject HUD's blanket assertion that the mere existence of an occupancy limitation without further proof of its disparate effect would in all cases establish a prima facie case of discrimination against families with minor children.

Even were I to conclude that a disparate impact analysis should apply in this case, and that the Charging Party established a prima facie case of disparate impact, for the reasons stated in the Initial Decision, Respondents have demonstrated that their three persons per unit occupancy restriction serves their legitimate business goals and is not a mere insubstantial justification. *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 658-59 (1989). In this regard the practice need not be essential or indispensable.⁷ Despite the Charging Party's assertions to the contrary, it, not Respondents, has the burden of persuasion to demonstrate the existence of alternative methods which would satisfy Respondents' legitimate business interests while lessening the impact on families with children. *Id.* at 660-61; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The Charging Party has yet to demonstrate the existence of any such alternatives.

Other Contentions

The Charging Party has made numerous arguments which dispute my conclusion that it did not demonstrate pretext for Respondents' three-person occupancy restriction. These arguments, for the most part, were either previously raised by the Charging Party and addressed in the Initial Decision, or could have been raised previously.⁸ After having both reconsidered

⁷The Charging party recognizes the applicability of *Wards Cove* only to the extent it supports its position concerning the use of nationwide statistics to prove a prima facie case of disparate impact. *See* Charging Party's Memorandum, p. 25. The Charging Party ignores a crucial portion of the *Wards Cove* holding that a prima facie case of disparate impact is rebutted by a demonstration of the existence of a substantial business justification. Rather, the Charging Party chooses to rely on the "business necessity" formulation set forth in *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984), and *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). The Charging Party has supplied no reason for continued reliance on a test which has been substantially reformulated by the United States Supreme Court.

⁸The Charging Party's Memorandum incorrectly characterizes the Initial Decision in two respects. First, the Charging Party states that the Initial Decision incorrectly found that "there was no evidence that the lease containing [the adults only language] was not distributed to new tenants [as of March of 1989]." Charging Party's Memorandum, p. 20 n.8. In fact, the Decision states that "new tenants were and continue to be *notified* that the Park is no longer an 'adults only' Park. Tr. 1, pp. 241, 248-49." Initial Decision at 5, Finding 16 (emphasis added). New tenants were notified of the Park's altered status "either through [the] letter . . . or through policy communication with residents." Tr. 1, p. 249. Second, the Charging Party's assertion that I came to the "apparent" conclusion that the Park was "densely populated," is incorrect. *See* Charging Party's Memorandum, pp. 13, 34. Rather, the Initial Decision recognizes that the Park *is* dense because its homes are close together and there is limited space for roads and amenities. Moreover, the Decision explicitly notes that at the time of the QCI study, 341 individuals lived in the Park's 229 spaces. Initial Decision, pp. 3, 4, 22.

Finally, the Charging Party states that there is no support in the record for the conclusion that the Park is located in a resort area. While one may quibble over the definition of "resort area," I note that the record includes a Colorado map which establishes that Golden lies within easy driving distance of numerous vacation spots and

and considered the Charging Party's arguments, I find no basis for reversing the Initial Decision and Order.

CONCLUSION AND ORDER

Accordingly, it is

ORDERED, that the Charging Party's request for relief is *denied*.

WILLIAM C. CREGAR
Administrative Law Judge

Dated: June 18, 1993